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Recognition of Legislative Interests in Conflicts Cases Arising under the Full Faith and Credit Clause

Harry A. Haines

RECOGNITION OF LEGISLATIVE INTERESTS IN CONFLICTS CASES ARISING UNDER THE FULL FAITH AND CREDIT CLAUSE.

INTRODUCTION

At the common law, courts and scholars recognized that each state possessed exclusive sovereignty and jurisdiction within its own territorial limits.[1] Conversely, they recognized that no state could "by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others."[2] Since persons and objects did frequently cross territorial boundaries and acquire *status* in several states, the common law courts were required to select the appropriate law to govern the disposition of the suit. Hence, the division of political society into territorial units was the factor which gave rise to Conflict of Laws.

At the common law, it was thought that conflict of laws rules were founded upon principles of sovereignty.[3] Laws emanated from and were enforced by the sovereign. The authority and power of the sovereign over the persons and objects within the boundaries of the state was unquestioned. In order to select the appropriate law in a conflicts case, traditional analysis required the common law courts to examine the relationships between the person or object involved and the respective sovereigns. Consequently, each conflicts decision represented a balancing of sovereign powers and a selection of that sovereign's law which seemed to most directly affect the person or object in the suit.

Today, much of the concern and confusion in the conflicts field results from a failure to critically examine the sources of the law.[4] The common law position that conflicts rules are founded upon principles of sovereignty has fallen into disrepute. That approach de-emphasized, and perhaps disregarded, social and economic factors. At the same time, it overemphasized the position of government[5] in its relation to the law. The writer submits that a study of social, economic, and political factors is essential to the determination of the sources of conflicts rules and will aid in the clarification of analysis in the conflicts field.

[1] STORY, CONFLICT OF LAWS 21 (6th ed. 1865).

[2] *Id.* at 22.

[3] The term "sovereign" or "sovereignty" is difficult to define. To examine every facet of the term is beyond the scope of this paper. Suffice it to say that a sovereign is "one who possesses supreme authority, especially a person or a determinate body of persons in whom the supreme power of the state is vested." 2 BRITANNICA WORLD LANGUAGE DICTIONARY 1201 (Funk & Wagnalls ed. 1958). The views expressed in this paragraph are set out as an exposition of the common law position. They do not represent the writer's position.

[4] Sources of law are the institutional interests from "which particular positive laws derive their authority and coercive force." Part of the definition is provided in BLACK, LAW DICTIONARY 1568 (4th ed. 1951). For a definition of "institutional interests" see the body of this article, *infra*.

[5] Government is used here in the sense of an "institution."

An emphasis upon the social, economic, and political factors in society necessarily suggests an analysis of the "institutions" which make up that society.[6] An "institution" is an organization wherein each individual is assigned his position and function in society for varying purposes.[7] It may be a combination of persons, an economic, or a religious unit; moreover, customs and mores find expression at every institutional level. These institutions provide the framework in which society operates. Laws are enacted to legitimize their existence. Other laws are created as the institutions change. Still others are passed to preserve political, economic, or social thoughts emanating from the institutions. In effect, the law becomes a reflection of the institutional interests of each state.[8]

The function of conflicts rules can only be defined by reference to the institutions which the rules represent.[9] Certain conflicts rules serve a power-recognition function and have been labelled "jurisdictional" conflicts rules.[10] The jurisdictional rule is applied to recognize in a given state a superior legislative interest[11] in a particular lawsuit. Other conflicts rules serve a policy-supporting function and have been labelled "choice of law" conflicts rules. A choice of law rule need not be applied in a given case unless its application is necessary to protect or support the policies of the state with superior legislative interest.

The importance of giving consideration to the source of conflicts rules becomes apparent in cases arising under the full faith and credit clause of the United States Constitution.[12] The purpose of the clause is to

[6]See Briggs, *Jurisdiction by Statute*, 24 OHIO ST. L.J. 223, 237 n.63 (1963).

[7]EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 24, 40, 79, 85, 116, 118 (Moll transl. 1936). An organization is essentially a rule of conduct. See EHRLICH, *supra* at 24. An individual or a thing may, of course, be a member of many institutions. A businessman, for example, is a member of the nation, the state, his local fraternal group, his family, his church, his type of business activity, and many others. Nevertheless, each of these memberships shapes his function and position in society for differing ends.

[8]Laws can reflect only a part of the institutional interests of a state. However, some institutions find expression by incorporation in other institutions. As an example, many established customs are never codified and yet they find expression in court made law.

[9]Such an approach and its use of a dual category of conflicts rules was originally set down by Professor Edwin Briggs in 1943. See Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L.J. 77 (1943). See also Briggs, *The Jurisdictional—Choice of Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165 (1948); Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667 (1953); Briggs, *The Need for the "Legislative Jurisdictional Principle" in a Policy Centered Conflict of Laws*, 39 MINN. L. REV. 517 (1955). For a graphic interpretation of the dual category see the article in 6 VAND. L. REV. at 669.

The scope of the application of the dual category has not yet been defined. However, it has recognized utility in problems involving subject matter jurisdiction. To this date it has been applied to conflicts cases dealing with land, tangible moveables, marriage, torts, intangibles, and procedure. This paper seeks to establish its utility in conflicts cases arising under the full faith and credit clause.

[10]For an expanded discussion of the jurisdictional-choice of law dichotomy, see the body of this article, *infra*.

[11]By "legislative interest" the writer does not wish to denote only formal laws enacted by the legislative branch of a government. Rather, legislative interest is used to show the affiliation which an institution in a given state has with the subject matter or person in a suit.

[12]U.S. CONST. art. IV, § 1.

alter the status of states as independent "sovereignties"[13] and to make them integral parts of the nation.[14] The United States Supreme Court wields an awesome power by means of full faith and credit which, if used without weighing and analyzing the interests of each state, could result in unjustified infringements upon state interests.[15]

This article will discuss, first, the function which, in an institutional framework, certain conflicts rules serve, and second, the utility of such an analysis of court determinations under the full faith and credit clause.

II. ANALYSIS.

A. The Jurisdictional Rule.

Since a forum court in a conflicts case is usually confronted with numerous laws, it must initially select the law which controls the suit.[16] At this point in the forum's analysis, it must ask whether some one state has paramount legislative interest.[17] If it finds such a state, then it will determine the issues as would the court of that state.[18] To illustrate,

[13]The term "sovereign" or "sovereignties" is used by the courts in their interpretations of the full faith and credit clause.

[14]Milwaukee County v. White Co., 296 U.S. 268 (1935); Johnson v. Muelberger, 340 U.S. 581 (1951).

[15]Although the full faith and credit clause applies to public acts as well as judgments, a consideration of public acts cases is beyond the scope of this paper. It should be noted, however, that very few general rules have been laid down in this area due to the peculiarities of the statutes involved. Two rules are well established. One state need not substitute the laws of another in deciding the case. See, *e.g.*, Pacific Employer's Ins. Co. v. Indus. Acc. Comm'n, 306 U.S. 493, 502 (1939). Nor is a state required to enforce foreign statutes which confer a right that is obnoxious to the public policy of the forum. See, *e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); Huntington v. Attrill, 146 U.S. 657 (1892); Finney v. Guy, 189 U.S. 335 (1903); see also Clarke v. Clarke, 178 U.S. 186 (1900); Hood v. McGehee, 237 U.S. 611 (1915); *cf.*, Gasquet v. Fenner, 247 U.S. 16 (1918).

For an example of weighing and analyzing of state interests in public acts cases, see Alaska Packers Ass'n v. Indus. Acc. Comm'n, 294 U.S. 532, 547 (1935); see also Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210-11 (1941); Pacific Employers Ins. Co. v. Comm'n, 306 U.S. 493, 502 (1939); State Farm Mutual Auto. Ins. Co. v. Duel, 324 U.S. 154, 160 (1945); Hughes v. Fetter, 341 U.S. 609, 611 (1951); Bradford Elec. Co. v. Clapper, 286 U.S. 145, 160 (1932) (dictum); Broderick v. Rosner, 294 U.S. 629, 642 (1935) (dictum).

[16]When the jurisdictional rule is applied, the laws of other states will, for the most part, be rejected. Although the basis of such rejection is not always clear, courts have acknowledged that the subject matter involved and the over-all nature of the litigation play an important part in the decision. See, *e.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Gordon v. Parker, 83 F. Supp. 40 (D. Mass. 1949); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); see also Learned Hand's analysis in Scheer v. Rockne Motors Corp., 68 F.2d 942, 944 (2d Cir. 1934).

[17]In some conflicts cases there may be no state with a recognizable superior legislative interest. However, conflicts cases may be broken down into four categories: (1) The cases in which there is a clearly recognizable superior legislative interest. (2) The cases in which several states may have significant contacts. In this class, a study of the precise issues in the litigation reveals the primacy of interest. (3) The cases in which there is no significant contact with any state. Here the forum may "pick and choose." (4) The cases in which the states recognize a common interest and decide the legal relations on that basis. These categories are given in an as yet unpublished manuscript by Briggs entitled General Theory for "Conflicts", Based in a Genuine "Sociology of Law."

[18]This approach should not be confused with the traditional use of the term renvoi to

assume that a quiet title action has been instituted in the forum state, F, and that the land is located in a second state, S. Due to the unique character of land, the established conflicts rule is that the law of the situs of land delimits all interests in it.[19] Consequently, F refers to the law of S, using the situs rule as its jurisdictional rule. F does so in recognition of S's superior legislative interest in the land and must, of necessity, abdicate its own legislative interest in making the reference.

On the other hand, in this quiet title action, if the forum is also the situs of the land, the court may choose either to apply its own internal-domestic law or the law of a foreign state to finally dispose of the suit.[20] If the forum decides that its own laws are adequate to determine all the issues, it simply applies its internal law. If the forum refers to foreign law by means of a choice of law conflicts rule, such reference does not concede legislative power in the foreign state nor function as a power-recognition rule, but merely is used to effectuate the exclusive legislative policies initially recognized in the forum-situs.

A situs rule for immoveables[21] which recognizes a superior legislative interest in the situs state is consistent with an acknowledgment of the legislative power of that state, the economic nature of the immoveable, and commercial convenience.[22] An owner's rights in the immoveable are capable of definition only in the state wherein the immoveable is situated.[23] Hence, the scope and "content of the right[s] of ownership in each immoveable is determined, either positively or negatively . . ."[24] by the law of the situs, and that law is drawn from the economic nature of the thing.[25] As Ehrlich points out: "The economic nature of a thing

describe the "sitting and judging" theory as illustrated in *In re* Annesley, [1926] 1 Ch. 692. Compare the articles by Griswold and Briggs found in ASS'N OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS 160-188, 189-196 (1956). See also Briggs, *An Institutional Approach to Conflict of Laws: "Law and Reason" Versus Professor Ehrenzweig*, 12 U.C.L.A.L. REV. 29 (1964).

[19]See, *e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Kerr v. Moon, 22 U.S. (9 Wheat.) 565 (1824); M'Cormick v. Sullivant, 23 U.S. (10 Wheat.) 192 1825); Montgomery v. Samory, 99 U.S. (9 Otto.) 482 (1878); Smith v. McCann, 65 U.S. (24 How.) 398 (1860), where the legal and equitable interests were controlled by the situs; Christian Union v. Yount, 101 U.S. (11 Otto.) 352 (1879); Carpenter v. Strange, 141 U.S. 87 (1891).

[20]At this point in the forum's analysis, it may use a "choice of law" conflicts rule because the forum recognizes in itself a superior legislative interest. The choice made will depend upon the legislative policies of the forum state.

[21]An immoveable may be defined as "property which, from its nature, destination, or the object to which it is applied, cannot move itself, or be removed." BLACK, LAW DICTIONARY 885 (4th ed. 1951).

[22]The reasons given are consistent with those of the most recent Restatement. See RESTATEMENT (SECOND), CONFLICT OF LAWS, Introductory Note §§ 214-254 at 12-14 (Tent. Draft No. 5, 1959).

[23]Only the situs state has the "exclusive power to promulgate the law which shall regulate its [the immoveables] ownership and transfer." *In re* Schneider's Estate, 96 N.Y.S.2d 652, 656 (Surr. Ct. 1950).

[24]EHRLICH, *supra* note 7, at 100. Note should be made that the terms "ownership" and "possession" have been made interchangeable by statutes. See, *e.g.*, REVISED CODES OF MONTANA, 1947, § 67-201. For a discussion of this point, see EHRLICH, *supra* note 7, at 103-104.

[25]See EHRLICH, *supra* note 7, at 94-104, 116, 328 for discussion on immoveables.

determines the relation between the owner and a neighbor; it determines the inner organization of the undertaking which it subserves and the position of the latter in commerce."[26] The law of the situs reflects these facts. Finally, commercial convenience and certainty are assured if the situs rule is used.[27] If state laws other than those of the situs are applied, certainty of outcome in commercial transactions involving immoveables would be undermined. There must be uniformity and predictability of result which can only be obtained by reference to the law of a particular state, the situs state.

B. Delimitation of the Jurisdictional Rule.

The recognition of a "jurisdictional" conflicts rule does not foreclose the application of several states' laws to the facts in a conflicts case. The rule does, however, determine the function played by the other laws by limiting their applicability to situations demanded by the policies of the state with superior legislative interest. The three illustrations that follow define, to some degree, the scope of the jurisdictional rule.

1. *Land.*

Fall v. Eastin[28] illustrates the inability of a state, not the situs, to control the conveyance of land. In that case, a husband acquired title to land in Nebraska. Thereafter, he and his wife moved to Washington where the latter instituted divorce proceedings. The divorce decree was accompanied by an order compelling the husband to convey title to the land situated in Nebraska. The husband did not comply with the order and, in fact, conveyed the land to third parties. The wife later brought suit in Nebraska wherein she pleaded the Washington judgment and a deed given by an agent of the Washington court as placing title in her. The Nebraska court held that it did not have to give full faith and credit to the Washington judgment and therefore, quieted title in the conveyees of the husband.[29] The decision was affirmed by the United States Supreme Court.[30]

The *Fall* case illustrates an interesting point. Had the husband complied with the order of the Washington court and conveyed the land to his wife, the effectiveness of the conveyance would not have been due to the power that the Washington court had over the husband, but rather to the power of Nebraska, as situs, in allowing the conveyance to stand under full faith and credit. Nebraska,[31] being the situs, had the power to

[26] Ehrlich, *supra* note 7, at 102.

[27] Restatement (Second), Conflict of Laws, *supra* note 22, at 13. See also Ehrlich, *supra* note 7, at 103.

[28] 215 U.S. 1 (1909).

[29] Fall v. Fall, 75 Neb. 120, 113 N.W. 175 (1907).

[30] *Supra* note 28.

[31] Two recent cases have reconsidered the problem raised in *Fall v. Eastin*, *supra* note 28, and have come to opposite conclusions after considering the legislative policies of the states involved. *Compare* Weesner v. Weesner, 168 Neb. 346, 95 N.W.2d 682

delimit all interests affecting title to that land and recognized this power in itself. Moreover, the court would uphold a voluntary conveyance by the husband but would not allow a conveyance by an agent of the foreign state. The reason is simply that the situs-court asserts different policy considerations in each situation. The conveyance by the husband is his own act and normally the situs-court would not look behind the transaction, but a conveyance by an agent of a non-situs court is ineffectual because the situs reserves unto itself the power to delimit interests in land.[32]

2. *Situs and Succession to Moveables.*

The rule prevails in the United States[33] and arguably in England[34] that the situs delimits interests in tangible moveables.[35] The doctrine springs, as with land, from the territorial theory of conflicts wherein it is declared that "every State has the right to regulate persons and things within its own territory according to its own sovereign will and pleasure."[36] The rule performs the same function as the situs rule for land. It is essentially a power-recognition rule placing the law of the situs of the moveable as the controlling law.[37]

(1959), *with* McElreath v. McElreath, 331 S.W.2d 375 (Tex. Civ. App. 1960). The Nebraska court in the *Weesner* decision gave full faith and credit to a Wyoming divorce decree ordering the delivery of real property in Nebraska to a wife in lieu of alimony. The court reasoned that its legislative polices did not prohibit such a decision, although it recognized that a court of one state may not directly affect title to real property in another state. In *McElreath*, a Texas court refused to give full faith and credit to an Oklahoma divorce decree affecting property in Texas since such an approach would contravene the public policy of Texas.

[32]For further discussion see Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667, 677-78 (1953); Comment, *Validity of Deed Given under Compulsion of "Foreign" Court*, 12 MONT. L. REV. 59 (1951). See also Olmsted v. Olmsted, 216 U.S. 386 (1910); Morris v. Hand, 70 Tex. 481, 8 S.W. 210 (1888).

[33]Frick v. Pennsylvania, 268 U.S. 473 (1925); City Bank v. Schnader, 293 U.S. 112 (1934); Curry v. McCanless, 307 U.S. 357 (1939); Riley v. N.Y. Trust Co., 315 U.S. 343 (1942). See also these early state cases: Desebats v. Berquier, 1 Binn. 335 (Pa. 1808); Jones v. Marable, 6 Humph. 116 (Tenn. 1845). See Briggs, *The Jurisdictional—Choice of Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165, 1167-73 (1948); RESTATEMENT (SECOND), CONFLICT OF LAWS, Introductory Note, §§ 254a-310, at 78-82 (Tent. Draft No. 5, 1959).

[34]LALIVE, THE TRANSFER OF CHATTELS IN CONFLICT OF LAWS 116-20, 126-27 (1955); ZAPHIRIOU, THE TRANSFER OF CHATTELS IN PRIVATE INTERNATIONAL LAW 77-78, 81-82 (1956); Briggs, *"Renvoi" In the Succession to Tangibles: A False Issue Based on Faulty Analysis*, 64 YALE L.J. 195, 197 *et seq.* (1954).

[35]Note that the Restatement section on moveables includes a consideration of both tangible and intangible moveables. RESTATEMENT (SECOND), CONFLICT OF LAWS, *supra* note 33, at 78 *et seq.* (Tent. Draft No. 5, 1959). In the case of intangibles, courts have been reluctant to attribute a "situs" to them. See, *e.g.*, *In re* Estate of Waits, 23 Cal. 2d 676, 146 P.2d 5, 8 (1944). However, courts have recognized, expressly or tacitly, that the intangible may have institutional ties with other entities which give it a situs. See, *e.g.*, Atkinson v. Super. Ct., 49 Cal. 2d 338, 316 P.2d 960 (1957).

[36]Jones v. Marable, 6 Humph. 116, 118 (Tenn. 1845).

[37]Since we have defined the law to be a reflection of the social, economic, and political interests of a state, the institutional interests of a state, the situs rule for moveables may be restated as follows: it is essentially a rule which recognizes that the institutional policies in the situs state govern the disposition of the suit. Any references to other states' laws are controlled by those institutional policies of the situs state, and therefore, the situs' law is controlling.

The question then arises: What effect should be given to the rule that the law of the domicile governs the succession to interests in moveables? The United States Supreme Court has held that the domiciliary rule is used to complement the power-recognition situs rule.[38] It, in effect, becomes a choice of law rule used by the situs to fulfill its, the situs', own legislative purposes.[39] As the Court stated:

> [D]ecisions shown that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the State of its situs, and that the laws of other States have no bearing save as that State expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own.[40]

Hence, if the situs is the forum state, reference to the law of the domicile in no way limits the application of the legislative purposes of the situs. On the contrary, the reference is made to extend or uphold the situs' recognized superior legislative interest in the suit.

The forum state may also be the domiciliary state with the tangible moveable situated elsewhere. In this situation, reference to the law of the situs is some abdication of the legislative interests of the domicile. However, if the situs has a choice of law rule referring back to the domiciliary state's law, the forum court should have no difficulty in applying its own internal law acknowledging that the situs' legislative interests will be supported if this approach is taken.

The reasons for the application of a situs rule for moveables are aptly stated by the latest revision of the Restatement of Conflict of Laws.

> In some respects, a chattel occupies a position analogous to that of an immoveable. . . . It too is within the exclusive control of the state in which it is, and therefore, the officials of that state are the only ones who can lawfully deal with it physically. Likewise, a chattel can be said to be of greatest concern to the state in which it is at the time in question.[41]

Moreover, the revision council acknowledged that certainty in commercial transactions is aided by the use of the situs rule.[42]

[38]Frick v. Pennsylvania, 268 U.S. 473 (1925).

[39]The domiciliary rule performs a policy-supporting function.

[40]*Supra* note 38, at 491.

[41]RESTATEMENT (SECOND), CONFLICT OF LAWS, *supra* note 33, at 78-79 (Tent. Draft No. 5, 1959).

[42]*Id.* at 79. Any discussion of moveables and immoveables necessarily raises the problem of characterization. The situs should characterize the term moveable. See RESTATEMENT (SECOND), CONFLICT OF LAWS, *supra* note 33, at 78 (Tent. Draft No. 5, 1959). *Accord*, Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667, 701 (1953). A general discussion on the problem of characterization is outside the scope of this paper.

3. *Torts.*

The scope of the jurisdictional rule should be carefully defined so as to give full effect to the legislative interests of all the states concerned. The need for careful analysis is apparent in conflicts cases involving torts. The established conflicts rule is this: the place of the injury controls all rights arising therefrom.[43] The California decision of *Emery v. Emery*[44] illustrates how the application of this rule, as a jurisdictional rule, is delimited by legislative interests of states other than the place of injury.

The *Emery* case involved a tort action between members of the same family arising out of an automobile accident in Idaho. All parties to the action were domiciled in California where the suit was instituted. The forum court was confronted with the determination of the sufficiency of the complaint and the question of immunity from suit because of the family relation. Although the California court initially recognized that the place of the injury controls all rights accruing therefrom, and therefore referred to Idaho law, it limited the jurisdictional rule's applicability to considerations of the sufficiency of the complaint. As to the immunity issue, the court applied California law due to the substantial role which the family relation played in the outcome of the litigation.[45] As Mr. Justice Traynor stated:

> We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and *it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents.* Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home.[46] (Emphasis supplied.)

In the above case the distinctive legislative interest of each state is

[43]See, *e.g.*, Young v. Masci, 289 U.S. 253, 258 (1933); Cuba R.R. Co. v. Crosby, 222 U.S. 473, 478 (1912).

[44]45 Cal. 2d 421, 289 P.2d 218 (1955).

[45]The Wisconsin Supreme Court has agreed substantially with the approach of the California court in the *Emery* decision, *supra* note 44, despite the fact that it had to overrule six cases and partially overrule two others. Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). The *Haumschild* case restricted its holding in its interpretation given to the reference to foreign law. It found that if the suit involved a family relation, the choice of law rule of a foreign state would never be applied. See 95 N.W.2d at 820. If this position is taken literally, the court fails to recognize that a foreign choice of law rule may be applicable in a domestic relation case if the forum-domiciliary state holds the application of such a rule to be beneficial to its own legislative policies. For a criticism of one of the cases overruled by the court see Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667, 688-90 (1953).

[46]*Supra* note 44, 289 P.2d at 218.

clear, as is the supremacy of each on the respective issues. But this is not always true.[47]

A federal district court in another tort decision expressed the place of injury rule as the jurisdictional rule, but did not delimit the rule by reference to other law.[48] In the case both husband and wife were domiciled in Pennsylvania. The wife engaged in allegedly adulterous activity in Massachusetts, the state where the husband instituted a suit for alienation of affections. Pennsylvania had abolished a cause of action for alienation of affections.[49] In support of an allowance of the cause of action under Massachusetts law, the court stated:

> The social order of each [state] is implicated. As the place of matrimonial domicil, Pennsylvania has an interest in whether conduct in any part of the world is held to affect adversely the marriage relationship between its domiciliaries. But, as the place where the alleged misconduct occurred and as the place where the alleged wrongdoer lives, Massachusetts also has an interest. She is concerned with conduct within her borders which in her view lowers the standards of the community where they occur. She also is concerned when her citizens intermeddle with other people's marriages.[50]

To further support his application of the law of the place of injury, the judge noted the underlying factors responsible for granting Massachusetts law supremacy: such conduct was offensive to public morals, it was sinful, and Massachusetts had strong legislative interest in preventing self-help in such situations.[51]

The writer submits that an analysis founded in social, economic and political policy aids in the clarification of issues in conflicts cases. Moreover, a dual category of conflicts rules, the jurisdictional-choice of law dichotomy, established in terms of the function which the rules perform, seems not only justified but mandatory if the law is not to divorce itself from policies which regulate society.

III. THE FULL FAITH AND CREDIT CLAUSE.

The propriety of a collateral proceeding to test the jurisdiction underlying a sister state's judgment depends upon the interpretation given to

[47]A case may fit into the third category of conflicts cases. See *supra* note 17.

[48]Gordon v. Parker, 83 F. Supp. 40 (D. Mass. 1949). The differing results in this case and the *Emery* decision, *supra* note 44, can be explained by looking to the social institutions sought to be protected. In the *Emery* case, the family relation was deemed paramount whereas in *Gordon, supra,* the protection of social interests from disruption was of primary importance.

[49]Pa. Pub. Acts 1935, Pamphlet Law 450, as amended, Pa. Pub. Acts 1937, Pamphlet Law 2317; PA. STAT. tit. 48, §§ 170-177 (Supp. 1963). Although this did not seem to be a controlling factor in the court's determination, it was relied upon to show the lack of legislative interest in Pennsylvania. See *Gordon v. Parker, supra* note 48, at 43.

[50]*Gordon v. Parker, supra* note 48, at 42.

[51]*Ibid.*

two legal principles as they relate to the full faith and credit clause of the United States Constitution.[52]

The first principle, at least as it relates to jurisdiction over the person, is:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.[53]

The second principle is:

> [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory . . . may be acquired, enjoyed and transferred.[54]

From the second principle comes the further proposition that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[55]

The United States constitutional provision[56] which requires that "Full faith and credit shall be given in each State to the . . . judicial proceedings of every other State" and its implementing statute[57] that "such . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken" function to limit the "sovereignty" of the individual states so that litigation once pursued to judgment is ended.[58] Strictly applied, this provision would prohibit a collateral attack on the judgments of a sister state. However, the Supreme Court early recognized the impropriety of such an approach. In

[52]U.S. CONST. art. IV, § 1.

[53]Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931).

[54]Pennoyer v. Neff, 95 U.S. (5 Otto.) 714, 722 (1877).

[55]*Ibid.*

[56]U.S. CONST. art. IV, § 1.

[57]28 U.S.C. § 1738 (1958).

[58]*Supra* note 14. See also Atherton v. Atherton, 181 U.S. 155 (1901); Morris v. Jones, 329 U.S. 545 (1947).

Thompson v. Whitman[59] the Court held that the *jurisdiction* of the court rendering the judgment could be questioned in a collateral proceeding in another state. This rule has been tempered somewhat by a later decision which incorporated the local doctrine of res judicata into "national jurisprudence" by means of the full faith and credit clause.[60] Litigated issues between the same parties could not, therefore, be collaterally attacked.

Some writers, on the basis of the *Chicot County*[61] case have even extended the rationale underlying res judicata to issues in conflicts cases which were not litigated but could have been.[62] Since the case did not involve a conflicts situation, it should be limited to its facts. Moreover, the Court should allow collateral inquiry into jurisdictional issues in conflicts cases if sufficient grounds for the inquiry are presented.[63] As has been held in the *Treinies*[64] case, the right to inquire into the jurisdictional grounds of a sister state's judgment is "beyond question." To hold otherwise could result in cases which ignore state legislative interests that are affiliated with the cause of action.

Through the years the Court has distinguished between jurisdiction over the person and jurisdiction over the subject matter in cases arising under the full faith and credit clause.[65] The distinction is apparently based upon the fact that jurisdiction over the person may be obtained by consent,[66] whereas jurisdiction over subject matters depends upon location.[67] Furthermore, in the case of personal jurisdiction, it is established that jurisdictional issues fully litigated cannot be questioned collaterally by the same parties in a sister state.[68] However, until recently, no general rule had been laid down for subject matter jurisdiction. Some

[59]Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874). This position has been restated many times. See, *e.g.*, Knowles v. The Gaslight & Coke Co., 86 U.S. (19 Wall.) 58 (1873); Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25 (1917).

[60]American Surety Co. v. Baldwin, 287 U.S. 156 (1932). *Accord*: Stoll v. Gottlieb, 305 U.S. 165, 172 (1938); Chamblin v. Chamblin, 362 Ill. 588, 1 N.E.2d 73 (1936); *In re* Hanrahan's Will, 109 Vt. 108, 122, 194 Atl. 471, 478 (1937); *cf.*, Hill v. Wampler, 298 U.S. 460, 466 (1936).

[61]Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

[62]Note, *Jurisdiction and Collateral Attack*, 40 COLUM. L. REV. 1006 (1940); Note, 53 HARV. L. REV. 552 (1940).

[63]See text *infra* at 93.

[64]Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

[65]*Personal jurisdiction*: See, *e.g.*, Chicago Life Ins. Co. v. Cherry, 244 U.S. 25 (1917); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); RESTATEMENT, JUDGMENTS § 9 (1942); RESTATEMENT, CONFLICT OF LAWS § 451(1) (Supp. 1948); Durfee v. Duke, 84 Sup. Ct. 242 (1963) *Subject matter jurisdiction*: See, *e.g.*, Davis v. Davis, 305 U.S. 32 (1938); Stoll v. Gottlieb, 305 U.S. 165 (1938); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Sherrer v. Sherrer, 334 U.S. 343 (1948); RESTATEMENT, JUDGMENTS § 10 (1942); RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948).

[66]Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25 (1917).

[67]Pennoyer v. Neff, 95 U.S. (5 Otto.) 714 (1877); Frick v. Pennsylvania, 268 U.S. 473 (1925); Curry v. McCanless, 307 U.S. 357 (1939); Riley v. N.Y. Trust Co., 315 U.S. 343 (1942). The term "location" may be misleading when one thinks in terms of intangibles or a cause of action. Perhaps, a better usage would be location as determined by institutional affiliation.

[68]See *supra* note 65, and cases cited on personal jurisdiction.

consideration was given to the problem in *Durfee v. Duke*,[69] decided in December, 1963.

In the *Durfee* case a dispute arose over title to bottom land situated on the Missouri River. The main channel of the river forms the boundary between the states of Missouri and Nebraska. Petitioners brought a quiet title action in the courts of Nebraska. Jurisdiction over the land depended upon the factual determination of whether a shift in the river's course was due to avulsion or accretion. The respondent was served, appeared, and argued the issue of the location of the land. The Nebraska courts found the land to be located in Nebraska and consequently quieted title in the petitioners.[70] Thereafter, respondent filed a similar quiet title suit in a Missouri state court which was removed to a federal district court sitting in Missouri. The district court held that the issues litigated in Nebraska were res judicata to it and dismissed the action. On appeal to the circuit court of appeals, the lower court was reversed and collateral inquiry was allowed into the question of jurisdiction over the land.[71] The United States Supreme Court, on certiorari, held that the Nebraska decree was entitled to full faith and credit.[72]

The *Durfee* case gave the Court its first opportunity to decide whether principles of res judicata under the full faith and credit clause should apply to state judgments determining the location of land. The Court relied upon four of its previous cases, two of which involved recognition of foreign divorce decrees,[73] one the title to personal property,[74] and the last the effect of a federal bankruptcy court's judgment on a state court.[75] Since the question of subject matter jurisdiction had been litigated in each of these cases, the Court had held that res judicata should be applied. Seeing no reason to limit the applicability of the concept in the case of land, the Court extended its previous rationale to the *Durfee* case and gave the Nebraska judgment finality. The Court made it clear, however, that the Missouri court had power to inquire into the basis of jurisdiction of the Nebraska courts.[76] But, if the inquiry disclosed that the jurisdictional issues had been litigated, the Nebraska judgment was entitled to full faith and credit in the subsequent proceeding in Missouri.[77]

The Court expressly limited its holding in the *Durfee* decision to

[69]Durfee v. Duke, 84 Sup. Ct. 242 (1963).

[70]Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

[71]Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962).

[72]*Supra* note 69.

[73]Davis v. Davis, 305 U.S. 32 (1938); Sherrer v. Sherrer, 334 U.S. 343 (1948). In Williams v. N.C., 325 U.S. 226 (1945), the Court allowed collateral inquiry into jurisdictional issues in a divorce proceeding despite precedent disallowing such inquiry. Williams v. N.C., 317 U.S. 287 (1942). The doctrine of the second *Williams* case was considerably weakened by *Sherrer, supra*, and Coe v. Coe, 334 U.S. 378 (1948). At this time collateral inquiry cannot even be made by a third party who has not appeared in the original proceeding. See Johnson v. Muelberger, 340 U.S. 581 (1951).

[74]Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

[75]Stoll v. Gottlieb, 305 U.S. 165 (1938).

[76]*Durfee v. Duke, supra* note 69, at 248.

[77]*Ibid.*

the determination of the rights of the respective parties to title in the property. It did not decide whether, in fact, the land was located in either state.[78] Such a question could only be presented by a direct proceeding[79] or compact[80] between the states. Nor was the Court faced with the problem of determining whether the Nebraska judgment would be entitled to full faith and credit if, in a proceeding between the states, the land was adjudged to be located in Missouri. As Mr. Justice Black stated in the concurring opinion:

> I concur in today's reversal of the Court of Appeals judgment, but with the understanding that we are not deciding the question whether the respondent would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by compact between the two States under Art. I, § 10, that the disputed tract is in Missouri.[81]

Assuming that Missouri and Nebraska did take such action, it seems probable that the Court, in any subsequent dispute over the land, would deny full faith and credit to a Nebraska judgment if the land were found to be located in Missouri.

The rule that jurisdiction over the person, once litigated, is conclusive upon the parties is firmly imbedded and not subject to exception. However, the Court, even in *Durfee*,[82] has recognized that exceptions can be made in determinations involving jurisdiction over subject matter.[83] Such a position is also maintained by the Restatement, Conflict of Laws, which states:

> Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) the lack of jurisdiction over the subject matter is clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;

[78]A private action and determination of location of the land cannot bind the states. Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799); New York v. Connecticut, 4 U.S. (4 Dall.) 1 (1799); Land v. Dollar, 330 U.S. 731, 736-37 (1947).

[79]*Cf.*, Missouri v. Nebraska, 196 U.S. 23 (1904).

[80]See U.S. CONST. art. I, § 10.

[81]*Durfee v. Duke, supra* note 69, at 248 (concurring opinion).

[82]*Id.* at 246-247.

[83]Kalb v. Feuerstein, 308 U.S. 433 (1940); Vallely v. No. Fire Ins. Co., 254 U.S. 348 (1920); United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940). Note that in these cases jurisdictional issues were not litigated in the first forum.

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong.[84]

Taking subdivisions (a) and (e) together, had the *Durfee* case been decided after Missouri and Nebraska had settled the issue of the location of the land, the Nebraska court's lack of jurisdiction over the subject matter would have been clear, assuming that the land was adjudged part of Missouri. Moreover, courts have recognized that litigation involving land presents unique policy considerations.[85] The state in which the land is located has exclusive legislative interest in delimiting the effectiveness of conveyances,[86] the nature of ownership,[87] and regulation of any interests, whether legal[88] or equitable,[89] arising from that land. Furthermore, non-situs decrees affecting the devolution of property have been given no extra-territorial effect.[90] Hence, the scales would be tipped in favor of collateral inquiry and full faith and credit could be denied the Nebraska judgments.

CONCLUSION.

Inroads have been made into the integrity of the legislative interests of the several states, not only by federal legislation and federal court decisions, but by programs and laws adopted by the states themselves. Uniform laws and model acts have taken on greater importance in areas where states find common interests. The result has been a modification of position in order to facilitate the regulation of an increasingly complex society. A system of restatements has also encouraged the trend. The development is but another phase of man's search to find a functional system of laws which not only seem compatible with the aims of the individual governments concerned, but which also can serve as a common guide-post for regulation of society as a whole.

[84] RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948).

[85] See *supra* note 19, and cases cited. See also *In re* Schneider's Estate, 96 N.Y.S.2d 652 (Surr. Ct. 1950).

[86] RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 214-18 (Tent. Draft No. 5, 1959).

[87] *Id.* at §§ 219-20.

[88] *Id.* at §§ 221-24.

[89] *Id.* at §§ 225-40. The effect of a foreclosure is governed by the law of the situs. Note however, that issues which do not affect any interests in land even though they relate to foreclosure, are governed by the law of the debt covered by the mortgage. Where the law of the situs and debt coincide are illustrated by these cases: Maxwell v. Ricks, 294 Fed. 255 (9th Cir. 1923); Crews v. Mutual Ben. Life Ins. Co., 104 Ind. App. 183, 8 N.E.2d 390 (1937); McGough v. Derby, 254 App. Div. 708, 3 N.Y.S.2d 753 (2d Dept. 1938); Stumpf v. Hallahan, 101 App. Div. 383, 91 N.Y. Supp. 1062 (1st Dept. 1905). Other cases where the situs did not correspond with the law of the debt are: Thomson v. Hyle, 30 Fla. 582, 23 So. 12 (1897); Thompson v. Lakewood City Dev. Co., 105 Misc. 680, 174 N.Y. Supp. 825 (Sup. Ct. 1919); Hall v. Hoff, 295 Pa. 276, 145 Atl. 301 (1929).

[90] Fall v. Eastin, 215 U.S. 1 (1909); Clarke v. Clarke, 178 U.S. 186 (1900); Carpenter v. Strange, 141 U.S. 87, 105-06 (1891); Olmsted v. Olmsted, 216 U.S. 386 (1910).

With the continued expansion of the application of the full faith and credit clause by the Supreme Court, further encroachment into the regulation of relationships between the states can be the only result. The very purpose of the clause, as interpreted by the Court, is to limit the applicability of "sovereignty" in considerations of conflicts questions.[91] The end result of such an approach, not improbably, could be the evolution of a substantive federal conflicts system, the Court being placed in the position of recognizing the controlling legislative interests in cases falling under the full faith and credit clause. Such a position has, at this time, been partially achieved. Its development is consistent with the comparable trend in state adoption of uniform laws. However, the Court is dealing with situations where the states have not, to this point, conceded common interests. Necessarily then, the Court must be careful to place assertions of state interest in proper perspective.[92]

As an aid to all courts, the writer urges the use of a dual category of conflicts rules. This type of reasoning is not foreign to the Supreme Court and is receiving more and more recognition in the state courts. As has been noted, in the case of land, the Supreme Court has continually categorized the rule that the situs of land delimits the interests emanating therefrom as the jurisdictional rule.[93] Other rules governing types of litigation, as with succession, have taken a secondary position to the initial determination of the paramount legislative interest.[94] This rationale has also been applied in the tangible moveable field.[95] Moreover, the Court adopted such an approach in litigation involving the Federal Tort Claims Act where it interpreted the federal statute as functioning to indicate the state of controlling interest.[96] The most recent Restatement of Conflict of Laws is also consistent with this rationale.[97]

It is submitted that conflicts rules should be viewed in light of the function they perform. The importance of particular facts in conflicts cases requires clarity in the analysis of judges and lawyers alike. If the jurisdictional-choice of law dichotomy in conflicts rules is used, at least the initial step toward common understanding will have been made.

HARRY A. HAINES.

[91]See *supra* notes 13 and 58.

[92]*Supra* note 17.

[93]*Supra* note 19.

[94]*Supra* note 33.

[95]*Ibid.*

[96]Richards v. United States, 369 U.S. 1 (1962). The Court was confronted with inconsistent law in lower federal courts. See Voytas v. United States, 256 F.2d 786 (7th Cir. 1958); E. Air Lines v. Union Trust Co., 221 F.2d 62 (D. C. Cir. 1955); United States v. Marshall, 230 F.2d 183 (9th Cir. 1956); Landon v. United States, 197 F.2d 128 (2d Cir. 1952). Note that, based upon legislative hearings, the Court departed from the established conflicts rule that the place of the injury controls all actions accruing therefrom. The Court instead gave effect to the rule that the law of the place where the negligent act occurred, and not the place of operative effect, should govern the disposition of the suit.

[97]*Supra*, notes 86-89.